In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1294

LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

On July 16, 1973, the Equal Employment Opportunity Commission brought an action against petitioner in the United States District Court for the Northern District of Alabama under Section 706(f)(1) of the Civil Rights Act of 1964, as amended, 42 U.S.C. (Supp. III) 2000e-5(f)(1). The complaint alleged that petitioner engaged in discriminatory employment practices by hiring and classifying employees on the basis of race. It sought an injunction against those practices and an award of back pay for identifiable victims of the company's unlawful discrimination.

On petitioner's motion, the district court entered an order staying further proceedings for 60 days to permit further efforts at voluntary compliance. Those efforts were unsuccessful.

Upon expiration of the stay, petitioner filed a motion to dismiss the complaint. It argued (1) that, since the only administrative charge against the company had been filed with the Commission on April 27, 1970, the Commission's suit was barred by the 180-day statute of limitations which, it alleged, was implicit in Section 706(f); and (2) that the complaint should be dismissed because of the Commission's alleged failure to comply with its regulation, 29 C.F.R. 1601.23, which requires, under certain circumstances, that the Commission notify a respondent that conciliation efforts have been unsuccessful and that those efforts will not be resumed unless the respondent makes a timely written request.

The district court granted the motion and dismissed the Commission's complaint on both of the grounds asserted by petitioner (Pet. App. 36-44). The court of appeals (with one judge dissenting) reversed (*id.* at 20-35). It held that the Commission's authority to file suit is not limited to 180 days from the filing of the administrative charge (*id.* at 21-30) and that the Commission's notice to petitioner that conciliation had failed "was completely adequate and in conformity with" the only applicable regulation, 29 C.F.R. 1601.25 (*id.* at 30).

1. Petitioner's contention (Pet. 11-15) that Section 706(f)(1) imposes a 180-day limitation on the Commission's right to sue if conciliation attempts are unsuccessful has been correctly rejected by every court of appeals that has addressed the issue. *Equal Employment Opportunity Commission* v. *Cleveland Mills Co.*, 502 F. 2d 153 (C.A. 4), certiorari denied, February 24, 1975, No. 74-607; *Equal Employment Opportunity Commission* v. *Kimberly-Clark Corp.*, 10 FEP Cases 38 (C.A. 6); *Equal Employment Opportunity Commission* v. *General Dynamics Corp.*, 510 F. 2d 382 (C.A. 5), pending on petitions for writs of certiorari, Nos. 74-1378, 74-1444; *Equal Employment Opportunity Com-*

mission v. *E.I. duPont de Nemours & Co.*, C.A. 3, No. 74-1677, decided May 9, 1975; *Tuft* v. *McDonnell Douglass Corp.*, C.A. 8, No. 74-1890, decided May 27, 1975. We fully stated our views with respect to this issue in our Memorandum in Opposition to the petition for a writ of certiorari in *Cleveland Mills*, and we rely here on that Memorandum.[1]

2. Petitioner contends (Pet. 7-11) that it was entitled to notice under 29 C.F.R. 1601.23 that conciliation efforts had failed and that those efforts would not be resumed except upon timely written request. But Section 1601.23 applies by its terms only when "a respondent fail[s] or refuse[s] to confer with the Commission or its representative, or fail[s] or refuse[s] to make a good faith effort to resolve any dispute."[2] This is not such a case. Petitioner engaged in good faith conciliation efforts that did not result in voluntary compliance.

The applicable notice requirement in circumstances such as those here is contained in 29 C.F.R. 1601.25(a), which provides that "[i]n any instance in which the Commission is unable to obtain voluntary compliance * * *, it shall so notify the respondent * * *."[3] The court

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[1]We have sent a copy of the Memorandum to petitioner's counsel.

[2]Section 1601.23 provides:

> *Refusal of respondent to cooperate.* Should a respondent fail or refuse to confer with the Commission or its representative, or fail or refuse to make a good faith effort to resolve any dispute, the Commission may terminate its efforts to conciliate the dispute. In such event, the respondent shall be notified promptly, in writing, that such efforts have been unsuccessful and will not be resumed except upon the respondent's written request within the time specified in such notice.

[3]Section 1601.25 provides in pertinent part:

> *Notice to respondent, person filing a charge on behalf of the aggrieved person and aggrieved person.* (a) In any instance in

of appeals correctly found (Pet. App. 30), and petitioner concedes (Pet. 10), that the Commission complied with the provisions of Section 1601.25.

The decision in *Equal Employment Opportunity Commission* v. *Hickey-Mitchell Co.*, 507 F. 2d 944 (C.A. 8), relied upon by petitioner, is inapposite. Section 1601.23 was applicable there because the respondent expressly "declined to engage in conciliation with the Commission" (507 F. 2d at 946). Similarly, in *Equal Employment Opportunity Commission* v. *Kimberly-Clark Corp.*, *supra*, there had been no attempt to conciliate with respect to one of several charges. Even so, the court of appeals held that the Commission's failure in those circumstances to provide the notice ordinarily required by Section 1601.23 was harmless error (10 FEP Cases at 45-46).

3. Petitioner also argues (Pet. 16-18) that the Commission's conciliation efforts were inadequate in this case. But that contention was not made in the district court or the court of appeals, and neither court considered it. The issue, therefore, is not properly before this Court. *Lawn* v. *United States*, 355 U.S. 339, 362-363, n. 16.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULIA P. COOPER,
Acting General Counsel,
Equal Employment Opportunity Commission.

JUNE 1975.

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which the Commission is unable to obtain voluntary compliance as provided by Title VII, as amended, it shall so notify the respondent, the person filing a charge on behalf of the aggrieved person, the aggrieved person or persons, and any State or local agency to which the charge has been previously deferred * * *.